
(2020) 02 J&K CK 0075

In the Jammu And Kashmir High Court

Case No : WP(Crl) No. 57 Of 2019, IA No. 349 Of 2009

Mohd Rashid Malik

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 148, 336, 341
Jammu And Kashmir Public Safety Act, 1978 — Section 8(1)(a)

Citation : (2020) 02 J&K CK 0075

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Sunil Sethi, Waheed Choudhary, Amit Gupta

Final Decision : Disposed Of

Judgement

1. Impugned in this petition is an Order No.04 of 2019 dated 25.08.2019 passed by the District Magistrate, Jammu (for short? the detaining authority)

whereby the petitioner (hereinafter referred to as â??the detenu?) has been detained in preventive custody with a view to prevent him from acting in

any manner prejudicial to the security of the State. The case set up by the detenu is that he is a political worker affiliated to Peoples Democratic

Party. He claims to have contested the election on PDP mandate from Doda constituency. The wife of the detenu is also a political and social activist

and is presently Sarpanch of the Village Upper Sunjwan. It is stated that because of the political reasons, he has been targeted by his rivals and

involved in several criminal cases. It is submitted that in all the cases registered against him, he is either been acquitted or the cases have been closed

by the Police as â??not provedâ??. Out of the 09 different FIRs registered against the detenu for the period ranging from 1997 to 2019, he has been

acquitted in two whereas 05 FIRs against him have been closed and one FIR No. 110/2018 has been stayed by the High Court in CRM No. 105/2018.

It is, thus, urged that out of 09 FIRs only one FIR No.25/2019 registered for the commission of offences under Sections 341/336 and 148 RPC is

pending investigation.

2. In the backdrop of the aforesaid averments, the detenu claims that the impugned order of detention has been passed by the District Magistrate

concerned not with a view to prevent him from acting in any manner prejudicial to the maintenance of public order, but, for collateral purpose, i.e., to

deter the detenu from pursuing his legitimate political activities. The impugned order of detention has been inter alia assailed by the detenu on the

following grounds:-

(i) That the impugned order of detention is totally illegal, arbitrary and contrary to the provisions of Jammu and Kashmir Public Safety Act;

(ii) That basis of placing the detenu under detention, i.e., in 09 different FIRs registered against him does not exist for the reason that out of 09 FIRs

relied upon by the District Magistrate in the impugned order, 05 have already been closed, one stayed by this Court and only one FIR that too for a

petty offence is pending investigation.

(iii) That the requisite material, i.e., the copies of all the FIRs relied upon by the detaining authority have not been supplied to the detenu, as a result

thereof, right of the detenu to make effective representation against his detention has been taken away.

(iv) That the detaining authority has not shown his awareness with regard to the outcome of the FIRs taken note by it and relied upon in the grounds

of detention. The order impugned, therefore, is vitiated having been passed without any application of mind.

(v) That out of 09 FIRs relied upon in the detention order, at least 07 FIRs pertain to the period from 1997 to 2015 and therefore, would constitute

stale material for invoking the powers of detention by the District Magistrate under Section 8(1)(a) of the J&K Public Safety Act.

(vi) That the detaining authority has only acted on the dossier supplied by the Senior Superintendent of Police, Jammu and has not applied its

independent mind to arrive at requisite satisfaction and this fact alone vitiates the order of detention.

3. Interestingly, the District Magistrate, i.e., detaining authority has not come forward to defend its order of detention. Counter-affidavit has been filed

by one Rajinder Singh, Senior Superintendent of Police, who is not the detaining authority, but, is an authority, which has supplied the dossier to the

District Magistrate. The mere fact that the District Magistrate has not come forward to defend its order and has left it to the Senior Superintendent of

Police, Jammu to contest the matter and to file the counter-affidavit justifying the detention of the petitioner, is a ground sufficient in itself to quash the

order of detention. The allegation of the petitioner that there is no independent application of mind by the detaining authority and the detention order

has been passed merely on the basis of the request of the Senior Superintendent of Police, gets fully substantiated by sheer fact that it is the Senior

Superintendent of Police, Jammu, who has come forward to defend the detention and filed the counter-affidavit. The District Magistrate for the

reasons best known to it has chosen not to defend its order of detention. Since the order of detention must go on this ground only, as such, there is

hardly any need to advert to the other grounds of challenge urged in this petition. Yet, I have considered other grounds of challenge also urged by the

petitioner to assail the order of detention.

4. Having heard learned counsel for the parties and perused the record, I am of the view that the order of detention passed by the District Magistrate

concerned is not sustainable for the following reasons:-

(a) The District Magistrate has not appreciated that the FIRs registered against the detenu and relied upon for placing the detenu under detention

relate to the events, which are too remote in time and could not have been made the basis of detention. As noted above, out of the total 09 FIRs relied

upon, 07 FIRs pertain to the period w.e.f. 1997 to 2015. All FIRs except FIR No. 204/2015 pertains to the petty offence like 323 and 447 RPC. The

FIRs have been investigated and the law has taken its course. Some have been challaned and some are recommended for closure by the Police. In

that view of the matter, it was not a case for placing the detenu under preventive detention. The detenu could have been taken care of under

substantive law of the land.

(b) That the detaining authority has relied upon some FIRs, which have either been closed as not proved or the detenu has been acquitted by the

competent court of law. There is, thus, complete lack of awareness on the part of the detaining authority with regard to the status of these FIRs.

Whether or not order of detention has been approved by the Government is also not coming forth from the record of detention produced before me.

That apart, I find that the grounds of detention, is mere reproduction of the dossier supplied by the Police and there is no independent application of mind by the detaining authority.

5. From the perusal of the record, I find a communication of the detaining authority addressed to the Senior Superintendent of Police bearing no.

1300/DMJ/LO)/2019-20 dated 23.08.2019 whereby the District Magistrate, Jammu has returned the dossier submitted by the Police and refused to

issue the detention order on the ground that such cases could be handled under the substantive law. It is, however, not forthcoming from the record as

to what prompted the detaining authority to pass detention order after having returned the dossier submitted by the Police. This perhaps could have

been explained by the detaining authority by filing counter-affidavit, but, as already noted above, the detaining authority, for the reasons best known to

it, has chosen not to file the counter-affidavit and defend the order of detention passed by it. It may be pertinent to note that the copy of the detention

record produced before me is not a complete record of detention. It does not contain any order of approval of the Government nor the proceeding, if

any, taken before the Advisory Board are available. Whether or not the order of detention has ultimately been confirmed by the Government, is also

not forthcoming from the record.

6. It is pertinent to mention here that the preventive detention is not a quick alternative to normal legal process, is what is held by Supreme Court in V.

Shantha v. State of Telangana & ors, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding

him a "goonda" merely because the normal legal process is ineffective and time-consuming in "curbing the evil he spreads", is illegal and

that the detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient

remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to the

normal legal procedure would be time consuming and would not be an effective

deterrent to prevent the detenu from indulging in further prejudicial activities, affecting security of the State, and that there is no other option except invoking the provisions of the preventive detention Act as an extreme measure may only insulate the order of detention against any challenge in the court of law. No doubt, the offences alleged to have been committed by detenu are such as would attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. The preventive detention involves the detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha v. State of Tamil Nadu & another*, (2011) 5 SCC 244 and *V. Shantha v. State of Telangana* (supra) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

7. For the foregoing reasons, this petition is disposed of and Detention Order No.04 of 2019 dated 25.08.2019, passed by District Magistrate, Jammu, is quashed. The respondents are directed to release the detenu forthwith, provided he is not required in any other case.